WP(C) 5209/2006
BEFORE
HON'BLE JUSTICE B.K. SHARMA

JUDGEMENT AND ORDER

1. While the first two writ petitions have been filed by the petitioner making a challenge to the settlement of the particular fishery in favour of the private respondent, the private respondent has filed the third writ petition making a challenge to the order passed by the authority pursuant to interim order passed in the second writ petition, i.e. W.P.(C) No. 4900/06. In the first two writ petitions, the petitioner is one and the same and is a Cooperative Society registered under the Cooperative Societies Act, 1949. For the purpose of making settlement of the fishery called Karha Fishery (Part-I) for a period of five years w.e.f. 23.11.05 to 22.11.10, the Deputy Commissioner, Dhemaji floated notice dated 14.10.05 notifying tenders from the interested parties. The petitioner's society responded to the same by submitting its tender quoting the amount at Rs. 6,51,100/- per annum. Six other tenders including the private respondent had also submitted their tenders.

2. The tenders were opened on 29.10.05 in presence of the authority of the Dhemaji Zila Parishad and it was found that the rate/bid offered by the petitioner was the highest and the rate offered by the private respondent was the second highest at Rs. 6,50,621/-. According to the petitioner, the tender submitted by the private respondent was incomplete and defective, inasmuch as it did not submit yearly return from the Assistant Registrar of the Cooperative Societies nor did it submitted income tax clearance certificate. It also failed to submit the Bakijai clearance certificate issued by the competent authority. Be it stated here that as per clause-12 of the notice inviting bids, the tenderer is required to produce the certificate as proof of his not being defaulter in respect of any Govt. dues. Further as per clause-2 of the notice, income tax/sales tax clearance and Bakijai clearance certificate also required to be submitted along with tenders.

3. After the tenders were received, the Deputy Commissioner, Dehmaji who had issued the tender notice, prepared the comparative statement showing the particulars of the bids offered by the tenderers and the same was forwarded to the Govt. by letter dated 09.11.05. A copy of the letter dated 09.11.05 along with the comparative statement has been annexed as Annexure-B to the writ petition. In the letter it was indicated that on scrutiny of the documents submitted by the tenders, the bid offered by the petitioner was found to be the highest and accordingly approval for settlement was sought for. The statements reveal that while the petitioner's society submitted all the required documents, the private respondent did not submit the certificate from the bank , yearly return from the Assistant Registrar of the Cooperative Society and the income tax certificate. The bid offered by the petitioner was the highest, while that of the private respondents was the second highest.

4. While the petitioner was expecting the settlement of the fishery with necessary follow up action, the private respondent approached the Minister of Parliamentary Affairs, Water Resources & W.P.T & B.C. for favouring with the settlement and the said Minister in turn directed the Secretary to the Govt. of Assam in the Fishery Department to settle the fishery with the private respondent. From the letter, it appears that a process was initiated for retendering the fishery.

5. Being aggrieved by the aforesaid development, the petitioner approached this Court by filing the writ petition being W.P.(C) No. 8388/2005 and this Court while entertaining the writ petition passed the interim order in favour of the petitioner. Thereafter, the writ petition was finally disposed of by order dated 20.03.06 issuing direction to the authorities to decide the matter relating to

settlement of the fishery on merit by offering reasonable opportunity of hearing to the parties. It was further provided that endorsement made by the Minister to the Secretary of the Department shall be avoided.

6. After the aforesaid order of this Court, the Secretary to the Govt. of Assam in the Fishery Department, i.e. the respondent No. 2, passed the impugned order dated 25.05.06 settling the fishery with the private respondent at his bid of Rs. 6,50,621/-. The primary ground assigned for making the settlement in favour of the private respondent is that the private respondent is very nearer to the fishery although the petitioner's society is also within the neighbourhood of the fishery. Secondly, the difference of price bid between the petitioner and the private respondent being only Rs. 470/- is not substantial. Another ground assigned is that the petitioner's society has already been settled with another fishery and as per the policy decision of the Govt., two major fisheries should not be settled with one fishery Cooperative Society.

7. According to the petitioner, the finding recorded by the respondents towards settlement of the fishery in favour of the private respondent are utterly perverse. As regards the purported policy not to settle two fisheries with one Cooperative Society, the petitioner has contended that no such policy is in existence and even if any, being a hidden one, cannot be applied. In this connection, the petitioner has placed reliance on the decision of the Apex Court reported in (1997) 1 SCC 53 (Dutta Associates vs. Indo. Mercantiles).

8. The petitioner has also contended that no settlement can be made on ground of being very nearer to the fishery as the same is not contemplated in the Rule-12 of the Fishery Rules. According to the petitioner, the NIT never specified that a Cooperative Society being more nearer to the fishery would be preferred and that a Cooperative Society having settlement of one fishery would not be considered for settlement of another fishery. Thus, according to the petitioner these two purported criteria adopted by the respondent No. 2 are opposed to the principle laid down in Dutta Associate's Case. The petitioner has also contended that the private respondent having not submitted the required certificates including the Bakijai certificate contrary to the requirement of the NIT, could not have been settled with the fishery to the deprivation of the petitioner.

9. The first writ petition being W.P.(C) No. 2714, was entertained by order dated 02.06.06 and an interim order was passed staying operation of the impugned order dated 25.05.06 on condition that if the fishery was not officially handed over to the private respondent.

10. The occasion for the petitioner to file the second writ petition, i.e. W.P.(C) No. 4900/06 arose when the Circle Officer of the revenue circle passed the order dated 18.09.06 purportedly modifying the boundary of the fishery which was purportedly handed over to the private respondent earlier. However, in the order no indication has been given as to when the fishery was handed over to the private respondent. In the impugned order dated 18.09.06 the position of the fishery has been shown as, taken over and handed over. Thus, according to the petitioner in view of the earlier interim order dated 02.06.06 passed in W.P.(C) No. 2774/06, the order dated 18.09.06 could not have been issued by the Circle Officer in the name of modification of the boundary and handing over possession of the same to the private respondent.

11. Pursuant to the aforesaid interim order passed by this Court, the authorities issued WT message and signals both dated 05.06.05 issuing direction for stay of operation of the impugned settlement order. Referring to the WT message and Signal, it is the case of the petitioner that till issuance of the order dated 18.09.06 by the Circle Officer, the fishery was never handed over to the private respondent.

12. The order passed by the Circle Officer was on the basis of the order dated 01.09.06 passed by the Deputy Commissioner in the matter of redetermination of the boundary of the fishery. It was observed that the boundary of the fishery would remain the same until further order from the competent authority and the direction was issued to the Circle Officer to hand over the possession of the same with the boundary as indicated in the order. From this order also, it has been contended by the petitioner that even after issuance f the order dated 01.09.06 by the Deputy Commissioner, the fishery in question was not handed over to the private respondent. But it is only after the order of the Circle Officer dated 18.09.06, the fishery was sought to be handed over to the private respondent. The second writ petition being W.P.(C) No. 4900/06 was entertained by order dated 22.09.06 and it was provided that status quo as regards the possession of the fishery as was existing and interpreted and taken into account by the Official respondents on the date of passing the interim order dated 02.06.06 in W.P.(C) No. 2714/06, shall be maintained.

13. The private respondent has filed the 3rd writ petition being W.P.(C) No. 5201/06 making a grievance against the order dated 03.10.06 passed by the Deputy Commissioner directing the Circle Officer who had passed the aforementioned order dated 18.09.06 to maintain the status quo as regards the possession of the fishery in terms of the earlier order of this Court passed on 02.06.06. As per the own showing of the respondent No. 5, the kist money in respect of the settlement of the fishery was deposited on 25.07.06 and a copy of the challan has been annexed to the writ petition as Annexure-2. In terms of the interim order dated 02.06.06, the impugned order of settlement dated 25.05.06 passed by the respondent No. 2 settling the fishery with the private respondent was to remain stayed if the fishery in question, in the meantime, was not officially handed over to the respondent No. 5. No materials have been brought to the notice of this Court that at the possession of the fishery was handed over to the private respondent before passing the interim order dated 02.06.06.

14. The aforesaid interim order will have to be understood in the context of the observation of the Court in the order that as per communication dated 01.06.06 indicated in the order, same did not show deposit of any kist money. Needless to say that the deposit of kist money is the sine qua non for official handing over of possession. Mere forceful occupation of the fishery backed by no legal authority cannot amount to official handing over of the fishery as contemplated in the interim order dated 02.06.06. However, it has been all along a case of the private respondent who is the writ petitioner in W.P.(C) No. 5209/06 that prior to passing of the interim order dated 02.06.06, it had already taken over the fishery. The official respondents are silent as to whether the fishery in question has officially been handed over to the private respondent.

15. If the fishery was officially handed over to the private respondent there could not have been any occasion for the said respondent to file the writ petition being W.P.(C) No. 5209/06 making a grievance against the order dated 03.10.06 by which the Deputy Commissioner directed the Circle Officer to maintain status quo as regards the possession of the fishery in terms of the earlier interim order dated 02.06.06. If before passing the interim order dated 02.06.06 the private respondent was officially handed over the possession of the fishery, same would not have been disturbed by the impugned order dated 03.10.06 in W.P.(C) No. 5209/06 by which only a direction was issued to maintain the status quo as regards the possession of the fishery in terms of the earlier order dated 02.06.06.

16. The filing of the writ petition by the private respondent, i.e. W.P.(C) No. 5209/06, gives an impression that same has been filed to camouflage the situation which has arisen in view of the writ proceeding initiated by the petitioner’s Society by way of W.P.(C) No. 2714/06 and W.P.(C) No. 4900/06 and the interim orders passed therein.

17. The private respondent has not filed any counter affidavit to the writ petitions filed by the petitioner's society. However, the petitioner's society has responded to the writ petition filed by the private respondent by filing counter affidavit. Thus, the private respondent has not denied the specific plea raised by the petitioner that there was default on the part of the private respondent in submitting its tender by not annexing income tax/ sales tax clearance and Bakijai clearance certificates and so also the proof of being not defaulter as regards the Govt. dues. In the comparative statement prepared by the Deputy Commissioner, it has been indicated that the private respondent did not submit no dues certificate from the bank, yearly return from the Assistant Registrar of the Cooperative Society and certificate of income tax. If that was the position relating to the tender submitted by the private respondent, its tender was liable to be rejected being not in conformity with the requirements of the NIT.

18. I have heard Mr. I. Choudhury, learned counsel for the petitioner in W.P.(C) No. 2714/06 and 4900/06 as well as Mr. N.C. Das, learned Sr. counsel assisted by Mr. P.C. Deka, learned counsel appearing for the private respondent who is also the writ petitioner in W.P.(C) No. 5209/06. I have also heard Ms. R. Chokraborty, learned State counsel representing the state respondents.

19. The fact material for the purpose of determining the issue raised have been noted above. There is no dispute that the petitioner's Society was the highest bidder and the private respondent was the second highest bidder. While the petitioner's society complied with all the requirements of the tender notice, the private respondent failed to do so as will be evident from the comparative statement prepared by the Deputy Commissioner. The comparative statement was forwarded to the Govt. by letter dated 09.11.05 specifically recommending the case of the petitioner for settlement, it being the highest bidder. In the comparative statement it was clearly indicated that the tender submitted by the private respondent was defective due to non submission of no dues certificate from the bank, yearly return from ARCS and the certificate of income tax. According to the petitioner, the private respondent also did not submit the Bakijai clearance certificate.

20. The above aspect of the matter has not been denied by the private respondent by filing any counter affidavit to both the writ petitions filed by the petitioner. In the counter affidavit filed by the petitioner to the writ petition filed by the private respondent, this aspect of the matter has been highlighted to which there is no denial on the part of the private respondent by way of filing any affidavit in reply. If that be so, on this ground alone the tender submitted by the private respondent ought to have been rejected, but instead the official respondent decided to favour the private respondent with the settlement. Such decision of the respondent No. 2 will have to be considered in the context of the recommendation made by the Minister of Parliamentary Affairs unconnected with the Fishery Department. Even if the said Minister is connected with the Fishery Department, he could not have arbitrarily issued direction to the respondent No. 2 to make the settlement in favour of the private respondent. The tender process is initiated and finalized within the parameters and the principles underlying settlement through tender process. It is the Deputy Commissioner who had invited the tenders and on receipt of the same, he prepared the comparative statement and on that basis made the recommendation in favour of the petitioner. However, the respondent No. 2 without following the same, passed the impugned order dated 25.05.06 making settlement in favour of the private respondent.

21. The grounds on which the settlement has been made in favour of the private respondent have been noted above. There is no whisper in the impugned order as to the default on the part of the private respondent in not submitting the required documents, as noticed above, along with its tender. A strange reason has been given in the impugned order that the private respondent is in the more neighbourhood of the fishery than that of the petitioner. It has not been denied tha

t the petitioner is in the neighbourhood of the fishery. The relevant rules do n ot contemplate anything like more neighbourhood . If both the Cooperative Soci eties are in the neighbourhood of the fishery, they fulfill the requirement of b eing in the neighbourhood of the fishery. The distinction cannot be curved out i n the name of being in the more neighbourhood when such distinction is not conte mplated in the rules.

22. As regards the purported policy decision dated 14.06.82, undoubtedly sam e is an unsigned guidelines and without any indication as to circulation and app licability. Such purported guideline cannot override the provisions of the Assam Fishery Rules, 1953. Nothing could be shown from the rules that a Cooperative S ociety even on fulfillment of the requisite criteria for getting settlement of a fishery and also having been found more suitable for settlement, cannot be set tled with the same merely because it has also been settled with another fishery judging suitability. In the case of Ganga Fishermen Samabai Samity Ltd. Vs. Stat e of Assam and others (W.P.(C) No. 3152/06) disposed of by judgment and order da ted 18.08.06 dealing with the same question regarding applicability of the purpo rted guidelines dated 14.06.82, it has been held that such purported guidelines has no applicability and cannot override the provisions of the Assam Fishery Rul es, 1953. This decision has been upheld by the Division Bench of this Court by j udgment and order dated 07.12.06 passed in W.A. No. 384/06 and has been reported in 2007 (1) GLT 558.

23. As regards the plea of the respondent No. 2 towards passing the impugned order, that difference in price bid is very nominal same is not sustainable, f irstly because such a finding has been given after recording the finding in resp ect of the concept of being in the more neighbourhood and the aforesaid policy guidelines dated 14.06.82. There is no dispute that the petitioner with its val id tender is the highest tenderer. It is immaterial as to by what margin.

24. The consideration on which the fishery has been settled with the private respondent are immaterial once it is found and held that the tender submitted b y it was defective in view of non submission of the required documents about whi ch discussions have been made above. The respondent No. 2 in his impugned order has not stated anything as to how the tender submitted by the private respondent could be entertained even to the extent of making the settlement ignoring the f act that the tender submitted by the said respondent was defective being not acc ompanied by the required documents.

25. For the forgoing reasons and discussions, there is no escape from the co nclusion that the impugned order dated 25.05.06 (Annexure-E) to the writ petitio n being W.P.(C) No. 2714/06 is not sustainable. Likewise, the impugned order dat ed 18.09.06 (Annexure-K) to the writ petition being W.P.(C) No. 4900/06 is also not sustainable as the same amounts to overreaching the interim orders passed b y this Court. Even otherwise also, in view of the finding arrived at in this ju dgment, there is no question of any handing over the possession of the fishery t o the private respondent. The challenge made to the order dated 03.10.06 (Annexu re-10) in the writ petition being W.P.(C) No. 5209/06 filed by the private res pondent is totally misconceived. The said order dated 03.10.06 has been passed i n terms of the orders passed in the writ proceedings initiated by the petitioner and the same being only consequential order pursuant to the orders passed by th is Court, cannot be interfered with.

26. In view of the above, the first two writ petitions, i.e. W.P.(C) No. 271 4/06 and 4900/06 are allowed. The third writ petition, i.e. W.P.(C) No. 5209/06 is dismissed. There is no question of reconsideration of the case of the petitio ner vis- -vis the private respondent as it has been held that the tender submitt ed by the private respondent is defective. Even otherwise also, the said respond ent is not entitled to get the settlement on the reasons assigned in the impugne d order. The petitioner being the highest bidder, it should now be settled with the fishery. Appropriate order in this regard shall be passed by the competent a

uthority without any further delay, at any rate, not later than 30th April, 2007. This target has been fixed considering the State revenue.

27. The writ petitions, i.e. W.P.(C) No. 2714.06 and 4900/06 are allowed. The writ petition being W.P.(C) No. 5209/06 is dismissed. However, there shall be no order as to costs.